ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BHD v. VIRGINIA SURETY COMPANY LABUAN BRANCH

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN JC
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-13-03-2018]
28 FEBRUARY 2020

ARBITRATION: *Award – Setting aside – Application to set aside arbitral award – Dispute arising from re-insurance agreement – Arbitral tribunal dismissed claim – Tribunal made reference to fundamental principle of utmost good faith in re-insurance relationship in four paragraphs of majority award – Whether there was breach of natural justice in manner in which majority of arbitral tribunal arrived at decision – Whether arbitral tribunal obliged to repeat and regurgitate all arguments of parties when arriving at findings – Whether arbitral tribunal allowed to only pick and choose arguments deemed necessary for consideration – Whether parties accorded right to be heard – Whether arbitral award ought to be set aside – Arbitration Act 2005, s. 37(2)(b)(ii)*

ARBITRATION: *Award – Reference – Questions of law – Dispute arising from re-insurance agreement – Arbitral tribunal dismissed claim – Aggrieved party raised questions of law arising from arbitral award – Whether questions posed were legitimate questions of law – Whether issues raised in questions already considered and determined by arbitral tribunal during arbitration – Whether raising of questions of law an attempt to re-ventilate case – Whether questions ought to be answered – Arbitration Act 2005, s. 42*

The plaintiff was an insurer which provided cover for motor vehicles under an extended warranty programme ('EWP') while the defendant provided re-insurance cover for the EWP. The re-insurance cover was then formalised into a long-term treaty arrangement and the parties signed a contract for the extended warranty quota re-insurance treaty on 8 December 2009 (treaty re-insurance agreement ('TRA'). The first treaty was operative for the period of 1 October 2009 to 30 September 2010 ('first treaty') while the second treaty was operative for the period from 1 October 2010 to 30 September 2011 ('second treaty'). Both treaties had term limits which provided a provisional notice of cancellation ('PNOC'), allowing parties to review and vary the terms of the continuing treaty re-insurance. According to the plaintiff, (i) on 11 August 2011, it sent an email to the defendant, expressing its wish to continue with the TRA but on varied terms; (ii) on 12 October 2011, the defendant sent an email to the plaintiff stating its decision to not renew the TRA and to cancel the current re-insurance agreement; (iii) on 13 October 2011, the defendant sent a letter purporting to terminate the TRA; (iv) in a meeting held on 3 April 2013, the plaintiff affirmed the continuing relationship between the parties who agreed that the TRA would continue to subsist with varied terms; and (v) on 17 May 2013, the defendant informed the plaintiff that they were unable to take on any business from the

plaintiff. The plaintiff subsequently sought relief by invoking arbitration but the claim was dismissed by the majority arbitral award. Hence, the present application by the plaintiff (i) to set aside the arbitral award, pursuant to s. 37(2)(b)(ii) of the Arbitration Act 2005 ('Act'); and (ii) to refer three questions of law arising out of the majority award, pursuant to s. 42 of the Act. In support of its application to set aside the arbitral award, the plaintiff contended that (i) there was a breach of natural justice in the manner in which the majority of the arbitral tribunal arrived at its decision which related to the fundamental principle of utmost good faith in a re-insurance relationship; and (ii) the tribunal merely made reference to the utmost good faith principles in four paragraphs in the majority award. The plaintiff further submitted questions of law, arising out of the majority award, which required determination by the present court, pursuant to s. 42 of the Act, namely whether the tribunal (by a majority) could make a finding that the TRA between the parties did not continue beyond the anniversary date of 30 September 2011, without first deciding (i) whether the defendant owed a duty of utmost good faith to the plaintiff under the TRA and if so, the scope of that duty in law; (ii) whether the defendant had breached its duty of utmost good faith as re-insurer; and (ii) whether, if the defendant had breached its duty of utmost good faith, it should be prevented from denying the subsistence of the TRA from and beyond 30 September 2011, until it was validly and legally terminated. Resisting the plaintiff's application to set aside the arbitral award, the defendant argued that there was no breach of natural justice, in that, the tribunal had considered the plaintiff's submissions on the doctrine of good faith and concluded that the plaintiff failed to show how it applied to the formation of a contract for which there were clear principles of contract law. Objecting to the plaintiff's application for reference of questions of law, the defendant insisted that (i) the questions posed were not legitimate questions of law as they related to the alleged failure of the tribunal to consider the application of doctrine of utmost good faith. The tribunal had prudently considered the same and decided to dismiss it; and (ii) the plaintiff was merely attempting to re-ventilate its case.

Held (dismissing application):

(1) Natural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental. It was clear from the arbitration notes of proceedings that such right was never denied by the Tribunal. The failure of the tribunal (by majority) to explain its disagreement on the applicability of the utmost good faith principle beyond the four paragraphs in the majority award could not be an immediate basis to suggest a breach of natural justice. A tribunal is not obliged to slavishly adopt the position of parties but, instead, it is allowed to pick and choose the arguments it deems necessary for its consideration. The tribunal was not obliged to repeat and regurgitate all the arguments of the plaintiff in arriving at their findings. Not only would it be a cumbersome exercise

but it also means that the tribunal would be embarking on a repetition of the arguments and expressing their disagreements on each and every point raised by the plaintiff. If that was required of the Tribunal, it would merely be an elaborate box-ticking exercise by the tribunal of all arguments raised by the plaintiff. (paras 31, 34 & 35)

(2) When considering an application under s. 37 of the Act, it would be remiss if the case of *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* ('*Sigur Ros*') is not discussed. The court adopted the three principles laid down in *Sigur Ros* in determining the present application: (i) the conflict with public policy ground that is envisaged in s. 37(1)(b)(ii) ought to be narrowly and more restrictively read. The court's curial intervention should be sparingly used, and this would be in keeping with the terms in s. 8 of the Act; (ii) the threshold to be met is somewhat high in that by its very nature, 'it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach.' The court should be compelled to agree that the award conflicts with public policy; and (iii) an arbitral award would not be set aside merely because it is irrational or unreasonable. The concept of public policy must be one taken in the 'higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involved clear injury to public good or the integrity of the court's process and powers will thereby be abused.' (paras 38 & 39)

(3) Even when a finding that there has been a breach of the rules of natural justice, the court will still have to evaluate whether the discretion should be exercised in favour of the applicant. Section 37 of the Act is not an appellate provision; the court must not sit in appeal over the view of the arbitrator by re-examining and re-assessing the materials before him. In the absence of any breach of the rules of natural justice, it is the considered view of the court that it would not intervene to set aside or alter the majority award. (paras 57-59)

(4) Even if the question referred to this court was a question of law, the applicant must still show an error of law of 'patent injustice'. The court should also be slow in interfering with an arbitral award unless there is blatant injustice. The majority award had already determined that the issue before them was an issue of construction of contract. As such, the tribunal (by majority) did not see it necessary to consider the principle of utmost good faith. This was evident from their conclusion from paras. 83 to 86 of the majority award. There was no patent injustice caused by the majority in coming to this conclusion as they had embarked on an extensive review of the facts. (paras 63, 65 & 66)

(5) Any answer to the questions raised would have no effect. Answering the questions formulated by the plaintiff would inevitably require a re-examination of the facts. This would certainly run afoul of the 'mixed fact and law questions' prohibition and was outside the scope of s. 42

of the Act. The three questions of law were questions that were 'dressed up' as questions of law. As such, any 'dressed up' questions must escape the scrutiny of the court. The court was bound by the principle that the questions of law could not be the same questions that were referred to the arbitral tribunal for determination. The questions of law formulated by the plaintiff referred back to the issue of the applicability of the utmost good faith principle in the treaty of reinsurance, as well as the conduct of the parties to imply a 'handshake' agreement to provide re-insurance coverage. This necessitated a re-examination of the findings by the tribunal (by majority). This was not what was mandated upon the court to do in a s. 42 challenge. The principle of party autonomy decreed that a court ought not to question the arbitrator's findings of fact. (paras 66, 67, 69, 70, 71 & 72)

(6) An arbitration award is final, binding and conclusive and could only be challenged in exceptional circumstances. As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient for the setting aside of his award. Such is the extent of guidance given by courts in needing to be cautious when considering if an award should be altered or set aside. The position is even clearer where there is no basis to challenge the award. The plaintiff failed to establish its case to have the majority award set aside under ss. 37 or 42 of the Act. Similarly, there was no basis for the court to consider the alternative remedies applied by the plaintiff. Both challenges were dismissed with costs and the majority award of the arbitrary tribunal was upheld. (paras 73 & 74)

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

AKN And Another v. ALC And Others And Other Appeals [2015] 3 SLR 488 ***(refd)***

Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd [2015] 5 CLJ 1018 CA ***(refd)***

Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Geogas SA v. Trammo Gas Ltd (The Baleares) [1993] 1 Llyod & Rep 215 ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd [2013] 8 CLJ 655 HC ***(refd)***

MMC Engineering Group Bhd & Anor v. Wayss & Freytag (Malaysia) Sdn Bhd [2015] 1 LNS 703 HC ***(refd)***

MTM Millennium Holdings Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor [2013] 1 LNS 1325 CA ***(refd)***

Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd [2016] 3 CLJ 403 CA ***(refd)***

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2006] SGCA 41 ***(refd)***

A *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA* ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 ***(refd)***
Trustees of Rotoaira Forest Trust v. Attorney-General [1999] 2 NZLR 452 ***(refd)***

B **Legislation referred to:**
Arbitration Act 2005, ss. 8, 37(1)(b)(ii), (2), 42

For the plaintiff - Liew Teck Huat, Sitpah Selvanathan & Lim Qi Si; M/s Suflan TH Liew & Partners
C *For the defendant - Felix Raj, TS Lim, Kenneth Koh Arien On & YC Chian (PDK); M/s Chooi & Company + Cheang & Ariff*

Reported by Najib Tamby

JUDGMENT

D **Ahmad Fairuz Zainol Abidin JC:**

Introduction

[1] This originating summons seeks to set aside an arbitral award dated 8 February 2018 ("majority award") pursuant to s. 37(2)(b)(ii) of the
E Arbitration Act 2005 ("the Act") and further or alternatively, to refer to this court three questions of law arising out of the majority award pursuant to s. 42 of the Act.

[2] At the conclusion of the hearing, this court dismissed the originating
F summons. The following are the grounds of decision of this court.

Background Facts

[3] The plaintiff is an insurer which provides insurance cover for motor vehicles under an extended warranty programme ("EWP").

G **[4]** The defendant provided reinsurance cover for the EWP. The reinsurance cover which was initially provided on a facultative basis was then formalised into a long-term treaty arrangement. The contract for the 'extended warranty quota reinsurance treaty' was signed on 8 December 2009 (the "treaty reinsurance agreement"). Under the treaty, the plaintiff's
H retention was 10% whilst 90% was ceded to the defendant. The first treaty was operative for the period of 1 October 2009 to 30 September 2010 (the "first treaty").

[5] The second treaty entered into by the parties dated 8 December 2010 and was operative for the period from 1 October 2010 to 30 September 2011
I (the "second treaty").

[6] Both treaties had term limits which were stated as follows:

PERIOD

Continuous contract commencing **1st October 2009** subject to 90 days' notice of cancellation by either party effective on 30th September (Anniversary Date) any year.

It is understood that **provisional notice of cancellation** is automatically tendered at 30th June by both the REINSURED and Reinsurers hereon, unless otherwise advised by either party.

No formal documentation will be issued by either party.

And

PERIOD

Continuous contract commencing **1st October 2010** subject to 90 days' notice of cancellation by either party effective on 30th September (Anniversary Date) any year.

It is understood that **provisional notice of cancellation** is automatically tendered at 30th June by both the REINSURED and Reinsurers hereon, unless otherwise advised by either party.

No formal documentation will be issued by either party. (emphasis added)

[7] The term limits contained a provisional notice of cancellation ("PNOC") which allows parties to review and vary the terms of the continuing treaty reinsurance.

[8] It was the plaintiff's case that sometime in June 2011 it tried to contact the defendant to initiate discussions to revise the terms of the treaties. Thereafter, an email was sent on 11 August 2011 stating that the plaintiff wished to continue with the treaty reinsurance agreement but on varied terms as follows:

(i) retention increase from 10% to 40%; and

(ii) cession limit reduced from 90% to 60%.

[9] On 12 October 2011, the defendant sent an email to the plaintiff stating that it had decided not to renew the treaty reinsurance agreement that was pending renewal and to cancel current reinsurance agreement, followed by a letter purporting to terminate the treaty reinsurance agreement on 13 October 2011.

[10] On 4 April 2013, a meeting took place, which, in the plaintiff's position, affirmed the continuing relationship between the parties who agreed that the treaty reinsurance agreement continued to subsist with varied terms that are the plaintiff's retention to be increased to 20% and the defendant to maintain 80% share from 1 October 2011.

[11] However, on 17 May 2013, the defendant sent an email to the plaintiff informing the latter that it was unable to take on any business from the plaintiff premised upon unresolved issues queried by the defendant's department of justice.

[12] The plaintiff then sought relief by invoking arbitration. The tribunal constituted of three arbitrators; Gopal Sri Ram appointed by the plaintiff, Vinayak Pradhan by the defendant and Goh Joon Seng, the presiding arbitrator appointed by Gopal Sri Ram and Vinayak Pradhan.

[13] In a dissenting award dated 15 December 2017, Gopal Sri Ram allowed the plaintiff's claim. The majority award dated 8 February 2018 dismissed the plaintiff's claim.

[14] Dissatisfied, the plaintiff filed the present application each under ss. 37 and 42 of the Act to challenge the majority award hence the instant proceedings before this court.

Parties' contention

Setting Aside Of Majority Award Under s. 37(2)(b)(ii) Of The Act

[15] The plaintiff contended that there has been a clear breach of natural justice in the manner in which the majority arrived at its decision on 8 February 2018 as stated under s. 37(2)(b)(ii). The breach of natural justice complained of relates to the fundamental principle of utmost good faith in a reinsurance relationship.

[16] The plaintiff asserted that the crux of the issue is whether the treaty reinsurance agreement continued from 1 October 2011. It is their submission that on a plain reading of the treaty reinsurance agreement, it was not meant to be a contract for only a term of one year. Further, it was highlighted to this court that its email on 11 August 2011 disrupted the effect of the PNOC and an actual notice of cancellation is required to terminate the second treaty. Since the termination letter by the defendant was only issued on 13 October 2011, which was past the anniversary date, the termination could only take place the following year.

[17] The plaintiff submitted that the majority award was made with total disregard to substantive and fundamental fact that the defendant was under a duty of utmost good faith and it breached the duty in its dealings with the plaintiff by making a u-turn and refused to recognise the subsisting treaty reinsurance.

[18] In essence, the defendant's resistance to the setting aside is premised upon the fact that there is no breach of natural justice in that the tribunal had considered the plaintiff's submissions on the doctrine of good faith and concluded that the plaintiff had failed to show how it applies to the formation of a contract for which there are clear principles of contract law. The defendant further submitted that an insurance contract is not to be construed any differently from a commercial contract.

[19] It was also highlighted to this court that the background evidence showed that parties intended a yearly contract. Therefore, it is the defendant's contention that the tribunal was right in its finding that the second treaty came to an end on 30 September 2011 by virtue of the operation of the PNOC and the PNOC did not create a unilateral right for the plaintiff to extend the treaty or renew the treaty. A fresh treaty had to be negotiated. In view that this is the correct approach on construction of the treaty, the plaintiff's attempt to weave into it the principle of utmost good faith cannot be entertained.

Reference On Questions Of Law Under s. 42 Of The Act

[20] The plaintiff submitted that the following are questions of law arising out of the majority award which require determination by this court pursuant to s. 42 of the Act:

(i) whether the tribunal (by a majority) can make a finding that the treaty reinsurance agreement for the EWP between the plaintiff and the defendant did not continue beyond the anniversary date of 30 September 2011, without first deciding whether the defendant owed a duty of utmost good faith to the plaintiff under the reinsurance agreement and if so, the scope of that duty in law;

(ii) whether the tribunal (by a majority) can make a finding that the treaty reinsurance agreement for the EWP did not continue beyond the anniversary date without first deciding whether the defendant had breached its duty of utmost good faith as reinsurer; and

(iii) whether the tribunal (by a majority) can make a finding that the treaty reinsurance agreement for the EWP did not continue beyond the anniversary date without first deciding whether, if the defendant had breached its duty of utmost good faith, it should be prevented from denying the subsistence of the reinsurance agreement from and beyond 30 September 2011, until it is validly and legally terminated.

[21] It was further submitted that the key issue is whether the majority can make a finding that the treaty reinsurance agreement did not subsist beyond 30 September 2011 without first deciding the issue of the defendant's utmost good faith.

[22] In resisting the application under s. 42, the defendant insisted that the questions posed are not legitimate questions of law. It is their contention that the three questions relate to the alleged failure of the tribunal to consider the application of doctrine of utmost good faith. The tribunal had in fact prudently considered the same and decided to dismiss it. The defendant claimed that the plaintiff was merely attempted to reventilate its case.

[23] The arguments proffered by the plaintiff and the defendant will be examined below.

Analysis And Findings Of This Court On The s. 37(2)(b)(ii) Application

[24] The relevant parts of s. 37 of the Act provide as follows:

> Section 37. Application for setting aside
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> (1) An award may be set aside by the High Court only if:
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> (a) …
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> (b) The High Court finds that:
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> (i) …
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> (ii) The award is in conflict with the public policy of Malaysia
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> (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:
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> (a) the making of the award was induced or affected by fraud or corruption; or
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> (b) a breach of the rules of natural justice occurred:
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> (i) during the arbitral proceedings; or
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> (ii) in connection with the making of the award.

[25] The law on setting aside of arbitration awards under s. 37 of the Act is clear. As enunciated in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395, it is for the plaintiff to establish that the relevant provisions of s. 37 has been invoked to warrant a setting aside of the award. Further, it was held in the same case that the courts should be slow in interfering with an arbitral award unless there is patent injustice.

[26] In so far as s. 37(1)(b)(ii) is concerned, Court of Appeal in *MTM Millennium Holdings Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor* [2013] 1 LNS 1325 held that the concept of public policy is to be construed narrowly, such as only applicable when it is clearly injurious to the public good or where it violates the most basic notion of morality and justice. Similarly, the same principle applied in the Singapore case of *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41.

Whether The Tribunal (By Majority) Breach The Principles Of Natural Justice?

[27] From a perusal of the arbitration notes of proceedings, it is the finding of this court that the tribunal allowed both parties to submit at length on the issue of utmost good faith. This is evident from the arbitration notes of proceedings where several exchanges of submissions were made on utmost good faith. The arbitration notes of proceedings which refers to proceedings dated 13 October 2017 is evidence of how much latitude was given by the tribunal for the matter to be raised and argued by parties.

[28] The plaintiff complained that the tribunal (by majority), failed to address the utmost good faith principles adequately in their majority award as it was a fundamental issue to be determined by the Tribunal. The plaintiff opened their argument in their submissions by arguing "the arbitrators who delivered the majority award completely failed to address their minds and to deal with the substantive pleaded case and detailed submissions of Allianz based on utmost good faith".

[29] It was highlighted by the plaintiff that the tribunal merely made reference to the utmost good faith principles in four paragraphs, namely paras. 83 to 86 of the majority award.

[30] The said four paragraphs are as follows:

> 83. The Claimant also argues that as a result of good faith principles which apply to a relationship of insurer and reinsurer, the tribunal should conclude that the new Treaty has come into force between the Parties. The tribunal considers that this argument has no merit and rejects it for the reasons stated below.
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> 84. In essence, the 2nd Treaty came to an end on 30 September 2011 pursuant to its own terms. This is incontrovertible as a matter of construction of the 2nd Treaty. The cancellation clause further did not create a unilateral right by a party to the 2nd Treaty to extend the treaty or a unilateral option by a Party to enter into a fresh treaty. A fresh Treaty had to be negotiated and executed by both Parties. The Claimant's negotiation for a substantially different treaty (in anticipation of the expiry of the 2nd Treaty) including an increased retention of 40/60 share was not accepted by the Respondent.
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> 85. The Parties subsequent renegotiation and conduct in 2013 did not revive the 2nd Treaty or result in a fresh treaty. If at all the post 30 September 2011 conduct of the parties is relevant, this in fact, conclusively shows, as can be seen from the Tribunal's analysis of the facts above, including the evidence of Jesudass, that the 2nd Treaty did not continue after 30 September 2011 and that no further business was conducted under the 2nd Treaty after that date. The relationship of an insurer and reinsurer had come to an end on 30 September 2011 except for possible claims relating to the 1st Treaty and the 2nd Treaty. There was no relationship of insurer and reinsurer in forming the new Treaty to be negotiated as a fresh contract. It is also inconvertible that the Parties had not agreed on the terms of the fresh treaty before negotiations were discontinued.
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> 86. Even if any doctrine of good faith applied, the Claimant has not sufficiently defined the scope of the doctrine culled from the case to show how it applies to the formation of a contract for which there are clear principles of contract law. The terms of a fresh treaty not having been agreed upon, no tribunal or court can create a fresh treaty for the Parties.

[31] Natural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental. (See *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972). It is clearly seen from the arbitration notes of proceedings that such right was never denied by the Tribunal.

[32] In *AKN And Another v. ALC And Others And Other Appeals* [2015] 3 SLR 488, Sundaresh Menon CJ outlined the common arguments that are usually advanced when contending a breach of natural justice. His Lordship held as follows:

> 39. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint. Among the arguments commonly raised in support of breach of natural justice challenges are these:
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> (a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;
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> (b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and
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> (c) that the arbitral must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.

[33] The above three commonly raised arguments highlighted in *AKN* reminds this court of the need to be cautious when considering breach of natural justice arguments. This court cannot help but to equate the complaint raised by the plaintiff in the current case with the three common arguments highlighted by the court in *AKN*. As such, it would not be wrong for this court to be slow in accepting the arguments by the plaintiff that a breach of natural justice had occurred in this current case (see also *Ajwa For Food Industries Co*).

[34] This court is of the considered view that the failure of the tribunal (by majority) to explain its disagreement on the applicability of the utmost good faith principle beyond the four paragraphs in the majority award cannot be an immediate basis to suggest a breach of natural justice. A tribunal is not obliged to slavishly adopt the position of parties but instead it is allowed to pick and choose the arguments it deems necessary for its consideration. In *Trustees of Rotoaira Forest Trust v. Attorney-General* [1999] 2 NZLR 452, the court outlines the position as "an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause

for surprise that arbitrators make their own assessments of evidentiary weight or credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented."

[35] In short, the tribunal was not obliged to repeat and regurgitate all the arguments of the plaintiff when arriving at their finding. Not only would it be a cumbersome exercise but it also means that the tribunal would be embarking on a repetition of the arguments and expressing their disagreement on each and every point raised by the plaintiff. If that was required of the Tribunal, it would merely be an elaborate tick-boxing exercise by the tribunal of all arguments raised by the plaintiff.

[36] It would not be unreasonable for this court to infer that having allowed parties to address them on the principle of utmost good faith, the tribunal (by majority) found it fit not to accept the argument by the plaintiff. Instead, they found as a fact that the dispute was more of a "construction of a contract" issue.

[37] This is purely within the remit of the tribunal where findings were based on their factual assessment. It is open for the tribunal to make its own value judgments after exercising reasonable latitude before arriving at their own conclusion. To fault them for coming to the decision is fundamentally wrong as they are the master of facts and to substitute it with this court's factual assessment is an abject usurpation of the arbitral tribunal's role. This court finds support from the case of *Geogas SA v. Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 where the English Court of Appeal through Steyn LJ stated "... the arbitrators are the masters of the facts and there is a need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's findings of fact, or to dress up questions of fact on question of law are carefully identified and firmly discouraged".

[38] When considering a s. 37 of the Act application, it would be remiss of this court if the case of *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291 is not discussed, in particular where an issue of public policy is brought as grounds to persuade the court to review an arbitral tribunal's findings. The relevant paragraphs are as follows:

> [31] *Next, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties may be said to have received advice including legal advice, the conflict with public policy ground that is envisaged in s. 37(1)(b)(ii) ought to be read narrowly and more restrictively. The court's curial intervention should be sparingly used; and this would be in keeping with the terms in s. 8 of Act 646.*

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> [32] *This then makes the threshold to be met somewhat high in that by its very nature, 'it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public policy of Malaysia ... The court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained'.*
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> B
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> [33] Further, 'it must be understood that the notion or concept of public policy in arbitration is not one grounded in public law, generally understood as the *Wednesbury* principles. *In other words, the award will not be set aside simply because it is irrational or unreasonable or one that is so irrational or unreasonable that no reasonable person could have made such an award. The* C *concept of public policy must be one taken in the 'higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the 'integrity of the court's process and powers will thereby be abused'.* (emphasis added)

[39] This court adopts the defendant's summary of the three principles laid D down in *Sigur Ros* which can be distilled to be the following:

(i) the conflict with public policy ground that is envisaged in s. 37(1)(b)(ii) ought to be narrowly and more restrictively read. The court's curial intervention should be sparingly used, and this would be in keeping with the terms in s. 8 of the Act;

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(ii) the threshold to be met is somewhat high in that by its very nature, "it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach." The court should be compelled to agree that the award conflicts with public policy; and

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(iii) an arbitral award will not be set aside merely because it is irrational or unreasonable. The concept of public policy must be one taken in the "higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involved clear injury to public good or the integrity of the court's process and powers will thereby be abused."

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The above will be the guiding principles when determining this originating summons.

The Facts Surrounding The Dispute

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[40] It is appropriate for this court to revisit the pertinent facts which led the majority to conclude that there was no valid contract between the plaintiff and the defendant after the expiry of the second treaty. As stated above, the reinsurance cover which was initially provided on a facultative basis was then formalised into treaty reinsurance agreement. There was clear intention on the part of the plaintiff that the intention was to enable each party to I review their respective position before entering into a fresh 12 months contract. This can be seen from the email by the plaintiff's main

witness, Jesudass, which can be found at p. 24, tab 7 of exh. "ZK1" of the affidavit in support of the originating summons (encl. 2). The email dated 2 December 2009 reads as follows:

> As explained the 12 months offer opportunity for **both parties to review their respective positions before entering into another 12 months contract***. The reason we put up this treaty is not to overwrite any existing working arrangement between The plaintiff and VSC but only to formalise the reinsurance transactions from facultative arrangement to treaty. In doing so we can reduce workload and comply with internal and external regulation.
>
> *The continuous 5 years reinsurance contract as proposed by you is not workable. If there is any arrangement between The plaintiff and VSC working together on long term basis on certain account it should be reflected elsewhere but not in the treaty document.*
>
> (emphasis added)

[41] As such, it is clear that both parties are to review their respective position before a new treaty is entered into.

[42] Thus, what is then important to consider is the PNOC as can be found in the "PERIOD" section of the treaties. The PNOC of the first treaty and the second treaty are reproduced below:

> PERIOD
>
> Continuous contract commencing **1st October 2009** subject to 90 days' notice of cancellation by either party effective on 30th September (Anniversary Date) any year.
>
> It is understood that **provisional notice of cancellation** is automatically tendered at 30th June by both the REINSURED and Reinsurers hereon, unless otherwise advised by either party.
>
> No formal documentation will be issued by either party.

And

> PERIOD
>
> Continuous contract commencing **1st October 2010** subject to 90 days' notice of cancellation by either party effective on 30th September (Anniversary Date) any year.
>
> It is understood that **provisional notice of cancellation** is automatically tendered at 30th June by both the REINSURED and Reinsurers hereon, unless otherwise advised by either party.
>
> No formal documentation will be issued by either party.
>
> (emphasis added)

[43] As seen from the facts of the case, the first treaty and second treaty each had their validity period which at the expiry of period, a fresh treaty was entered into by the parties. Under both treaties, the plaintiff's retention was 10% whilst 90% was ceded to the defendant.

[44] The disputed issue arose after the second treaty expired. It was clear that the plaintiff through Jesudass, had written to the defendant asking for confirmation from the defendant if the treaty was to be continued into third treaty. However, there was a change on the retention percentages. It was proposed by the plaintiff that the third treaty if entered, would be the plaintiff at 40% while the defendant was to be 60%.

[45] This was clearly stated in Jesudass' email dated 11 August 2011 which can be found at tab 7 of exh. "ZK1" of encl. 2 (affidavit in support of the originating summons) at pp. 116 to 117. It reads as follows:

> … The treaty is a continuous contract subject to 90 days notice [sic] of cancellation by either party. It is also understood and agreed by both parties that provisional notice of cancellation is automatically tendered by both parties, although no formal documentation will be issued by either party.
>
> We have resigned the contract in 1st October 2010 **and the contract is due for resigning in 1st October 2011***. On our part we wish to continue with the contract incorporating the followings;
>
> a. Retention increased to 40% from the current 10%
>
> b. Cession Limit reduced from 90% to 60%
>
> …
>
> Would appreciate if you could get back to us with your thoughts/ proposals before the 24th of August 2011. The copy of the 2010/2011 treaty contract is attached herewith for your easy reference.
>
> (emphasis added)

[46] A reminder was sent by Jesudass *via* an email dated 16 August 2011 at p. 342 of tab 6 saying that the plaintiff would have "to decide on other reinsurers if VSC decides to discontinue the treaty". Another email dated 6 September 2011 at p. 343 of tab 6 was also sent which reads as:

> It is going to be a month since I sent the e-mail asking if you **are interested to continue*** your participation in our Extended Warranty Quota-Share Treaty but regret to note that we have yet to receive any reply from you.
>
> Please can you reply stating **your position on the renewal**?*"
>
> (emphasis added)

[47] It can be concluded at this stage that the treaty would require an express renewal if the reinsurance cover was to continue. If no agreement was reached, by operation of the PNOC, the treaty expires.

[48] A meeting between representatives of the plaintiff and the defendant was held on 4 October 2011. This was followed up by an email dated 6 October 2011 by the representative of the defendant, David Sulfridge. In essence the email stated as follows:

(i) he was "awaiting the determination of our go forward position in Malaysia";

(ii) the board of directors of the warranty group would be meeting on the week of 10 October 2011; and

(iii) "until the determination is made all new and renewal agreements remain on hold."

[49] David Sulfridge then sent an email dated 12 October 2011 informing Jesudass the decision to not renew the treaty. A letter dated 13 October 2011 as can be found at p. 51 of tab 6 was also sent by the defendant to the plaintiff to formally notify the defendant's position.

[50] There was no dispute or disagreement expressed by the plaintiff after the decision of the defendant was conveyed. It was in evidence that after 1 October 2011, the plaintiff did not provide any data on policies or premiums to the defendant. Parties acted as if the reinsurance agreement did not exist or in operation.

The 2013 Meeting

[51] It was not until sometime in March 2013 that communication between the plaintiff and the defendant recommenced. This led to a meet up between the plaintiff and defendant representatives on 4 April 2013.

[52] The plaintiff sought to rely on the several communications and the meeting as the event that reignited the contractual relationship between both parties. The "handshake" agreement according to the plaintiff was an expression of the principle of utmost good faith where parties can agree based on a mere handshake.

[53] During the arbitration proceedings, it was established that no discussion on the terms of the agreement was discussed during the said 4 April 2013 meeting. There were no details agreed upon and no treaty was finalised or signed in writing. This was expressly admitted by the plaintiff witness, Jesudass during the proceedings as seen from the arbitration notes of proceedings dated 12 October 2017.

[54] The plaintiff also relied on a letter sent by the defendant dated 5 April 2013 which documented the purported agreement for the quota share treaty reinsurance programme to be effective from 1 October 2011. The letter contains a clause that required parties to finalise the terms stated in the said letter. The letter ends with the defendant asking the plaintiff to confirm the terms proposed.

[55] After the 5 April 2013 letter, there were several exchanges of communication between the parties which the plaintiff claimed to have demonstrated the defendant's commitment to continue with the treaty hence triggering the utmost good faith principle. The "u-turn" as claimed by the plaintiff, occurred when the defendant informed the plaintiff on 17 May 2013 that it was unable to take any business from the plaintiff.

[56] It was against the backdrop of the above facts that the tribunal considered the claim of the plaintiff and the majority decided that there was no new reinsurance agreement between the parties after the expiry of the second treaty. The tribunal (by majority) had comprehensively discussed the facts as can be seen from paras. 40 to 73 of the majority award. The majority concluded their discussion on this issue at paras. 63, 72 and 73 which can be seen as follows:

> 63. The tribunal holds that upon the expiring of the 2nd Treaty of 8 December 2010 the relationship between the Claimant as insurer and the Respondent as reinsurer ceased. Their continued dealings with each other was limited to servicing claims that had arisen during the currency of the Reinsurance Treaties of 8 December 2009 and 8 December 2010. That was the position as of March 2013 when the Claimant's representatives including Jesudass met with the Respondent's David Sulfridge and Razak Shakor.
>
> …
>
> 72. By the evidence of Jesudass no new contract between the parties came into being by virtue of the events surrounding the dispatch and receipt of the Respondent's draft reinsurance treaty. As late as 1 April 2013, the Claimant's legal department was still reviewing the draft and the Respondent's draft agreement had not been accepted or approved by the Claimant. That remained the position as of the 5 April 2013 when at the request of the Claimant, the Respondent confirmed that the "agreement on the Quota Share treaty reinsurance will remain in force from 1 October 2011 subject to the following amongst which was a revised Quota Share reinsurance treaty contractual agreement **as mutually agreed**". [underlining added] The Respondent's draft revised Quota Share Treaty had not been agreed to by the Claimant and thus not "mutually agreed" as of the 5 April 2013 and remained so on 18 May 2013 when David Sulfridge conveyed the Respondent's CEO's and Board's decision to the Claimant by email which read:
>
> > "Dear Zakri,
> >
> > I very much regret that I must inform you that we are not able to take on business in Malaysia at this time. Apparently the inquiry with the United States Department of Justice has not been resolved and under the circumstances our CEO and Board of Directors concluded that it would be imprudent to add business in Malaysia. I have informed Razak Shakor that we will not able to go forward as hoped.

David

73. The tribunal therefore holds that there was no new reinsurance agreement between the parties after the expiration of the 2nd Treaty.

(emphasis added)

[57] It is the position of law that even when a finding that there has been a breach of the rules of natural justice, the court will still have to evaluate whether the discretion should be exercised in favour of the applicant. This was clearly outlined in *Sigur Ros* where the court held para. 63 as follows:

[63] Because s 37 vests the court with a wide discretion on whether to set aside an award, **we agree with the learned JC that the decision to set aside an award is not an automatic outcome of a finding that there has been a breach of the rules of natural justice**. The court will still have to evaluate whether discretion should be exercised in the applicant's favour. In considering whether discretion should be exercised, there should be an evaluation of relevant factors such as those identified in *Kyburn Investments Ltd v. Beca Corporate Holdings Ltd*, amongst which would be to consider the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration; leaving room for 'casual breach or occasional error' ... Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in that evaluation. This exercise is different from undertaking an exercise to show prejudice, which may be in several respects, including monetary rights. (emphasis added)

[58] Section 37 is not an appellate provision; the court must not sit in appeal over the view of the arbitrator by re-examining and re-assessing the materials before him as laid down in the Court of Appeal case of *Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd* [2015] 5 CLJ 1018.

[59] In the absence of any breach of the rules of natural justice, it is the considered view of this court that it will not intervene to set aside or alter the majority award.

Analysis And Findings Of This Court On The s. 42 Application

[60] The relevant parts of s. 42 provide as follows:

Section 42. Reference on questions of law

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) ...

(2) ...

(3) ...

(4) The High Court may, on the determination of a reference-

(a) Confirm the award;

A

(b) Vary the award;

(c) Remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) Set aside the award, in whole or in part.

B

[61] The Federal Court in its decision in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 ruled the following:

Test Under s. 42

C

[117] Under s. 42(1), any party may refer to the High Court "any question of law arising out of an award". And under s. 42(1A), "The High Court shall dismiss a reference made under sub-s. (1) unless the question of law substantially affects the rights of one or more of the parties". The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.

D

[118] An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s. 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable, and the like are not tests for the setting aside of an award.

E

...

[150] "The question of law must be one of law and not fact" (The Arbitration Act 2005 supra at p. 198). "An error of fact alone is insufficient" (*Dept of Education v. Azmitia* [2015] WASCA 246 per Mazza JA). But there is no universal definition of 'question of law'. Nonetheless, from our survey of the authorities, we would conclude that one of the following, which is not an exhaustive list, would meet the paradigm of 'any question of law' in s. 42:

F

G

(a) a question of law in relation to matters falling within (2) of Mustill J's three-stage test;

(b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);

H

(c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*): error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another (*MRI Trading*);

I

(e) a question as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v. Southam*);

(g) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s. 37 of AA 2005;

(i) a question of construction of a document (*Intelek*).

(see also *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; [2015] 6 MLJ 126 and *Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655; [2013] 5 MLJ 98)

[62] The Court of Appeal in *Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division* [2015] 3 CLJ 1; [2015] 3 MLJ 161 sets out the following guidance for the High Court when dealing with a s. 42 reference:

GUIDANCE FOR THE HIGH COURTS

[27] We wish to take the opportunity here to provide the following guidance for the benefit of the High Court Judges in dealing with a s. 42 reference. A High Court in considering a s. 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.

[28] *A High Court in dealing with a s. 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the 1st place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s. 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.*

[29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to the court is a proper and valid question. As the Court of Appeal said in *SDA Architects (sued as a firm) v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632; [2014] 2 MLJ 627 (at p 639 (CLJ); at p 633 (MLJ), paras [9]-[12]):

[9] In my judgment, for a proper invocation of s. 42(1) of the Arbitration Act 2005, the question referred to the High Court must be a proper and valid question.

[10] For the purpose of this judgment, I need only to focus on the 1st proposed question, since the 2nd proposed question is consequential in nature.

A

> [11] In my view, in the present case, this particular 'question of law' referred to the High Court purportedly pursuant to s. 42 is not a proper and valid question of law.
>
> [12] But how does one determine whether a particular question raised is a proper and valid question of law or not? In my judgment, one does so by considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator.
>
> (emphasis added)

B

[63] It is well established that even if the question referred to this court is a question of law, the applicant must still show an error of law of 'patent injustice'. This was clearly reiterated by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403. It has also held that the court should be slow in interfering with an arbitral award unless there is blatant injustice.

C

D

[64] In *Ajwa For Food Industries (supra)*, Ramly Ali JCA (as he then was) held as follows:

> [13] ... The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award. **The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene**. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice (see: *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v. Impregilo SpA & Others* [2005] UKHL 43). (emphasis added)

E

F

[65] As mentioned previously, the majority award had already determined that the issue before them was an issue of construction of contract. As such, the tribunal (by majority) did not see it necessary to consider the principle of utmost good faith. This is evident from their conclusion from paras. 83 to 86 of the majority award. There was no patent injustice caused by the majority in coming to this conclusion as they had embarked on an extensive review of the facts.

G

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[66] As such, given the finding of facts by the Tribunal, it would result in the applicability of the principle in vacuum. Hence, any answer to question raised would have no effect.

[67] This court is of the view that answering the questions formulated by the plaintiff will inevitably require a re-examination of the facts. This certainly will run afoul of the "mixed fact and law questions" prohibition

I

and is outside the scope of s. 42. It cannot escape this court's conclusion that the three questions of law were questions that were "dressed up" as a question of law.

[68] In *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617, salient principles governing the applicability of s. 42 of the Act were laid down.

> Some Governing Principles Under s. 42
>
> [57] On the present case-authorities, a number of propositions can be stated as guidelines. We enumerate these below, without intending them to be exhaustive, since clearly the law has to be developed further.
>
> (a) The question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; *Maimunah Deraman v. Majlis Perbandaran Kemaman*, *supra*;
>
> (b) The grounds in support must also be stated on the same basis;
>
> (c) The question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd, supra, Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*, *supra*);
>
> (d) The party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;
>
> (e) **The question of law must be a legitimate question of law, and not a question of fact "dressed up" as a question of law** (*Georges SA v. Trammo Gas Ltd (The Belarus)* [1993] 1 Lloyd's Rpe 215);
>
> (f) The court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*, *supra*);
>
> (g) This jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655);
>
> (h) Nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;
>
> (i) The arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Development (NZ) Ltd v. Doug Hood Limited* [2000] 3 NZLR 318); and
>
> (j) While the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse. (emphasis added)

[69] As such, any "dressed up" questions must escape the scrutiny of this court.

[70] This court is bound by the principle that the questions of law cannot be the same questions that were referred to the arbitral tribunal for determination. The questions of law now identified for determination of this court cannot be the same or be rehatched questions that the parties had already referred to in arbitration. (see *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (Malaysia) Sdn Bhd* [2015] 1 LNS 703; [2015] 10 MLJ 689; *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441).

[71] Having considered all the questions of law formulated by the plaintiff, this court finds that the questions refer back to the issue of the applicability of the utmost good faith principle in the treaty of reinsurance (ie, the PNOC) as well as the conduct of the parties to imply a "handshake" agreement to provide reinsurance coverage. This necessitates a re-examination of the tribunal (by majority)'s findings. This is not what is mandated upon this court to do in s. 42 challenge.

[72] The principle of party autonomy decrees that a court ought not question the arbitrator's findings of fact (see *Geogas SA* (*supra*)).

Conclusion

[73] The law regarding the effect of arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient for the setting aside of his award (see *Intelek Timur Sdn Bhd* (*supra*)). Such is the extent of guidance given by courts in needing to be cautious when considering if an award should be altered or set aside. The positon is even clearer where there is no basis to challenge the award.

[74] Premised on the foregoing reasons, this court is of the firm view that the plaintiff has failed to establish its case to have the majority award set aside under ss. 37 or 42 of the Act. Similarly, there is no basis for this court to consider the alternative remedies applied by the plaintiff. This court therefore dismissed both challenges in the originating summons with costs of RM30,000 and upheld the majority award of the arbitrary tribunal.